No. 76-1543

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIO J. GRASSO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

MYRON C. BAUM,
Acting Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

ROBERT E. LINDSAY,
CHARLES E. BROOKHART,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-25a) is not yet reported. The opinion of the district court (App. C, *infra*, pp. 27a-42a) is reported at 413 F. Supp. 166.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 26a) was entered on March 9, 1977. On

March 30, 1977, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including May 8, 1977 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars a second trial of a defendant whose first trial is terminated, following his motion for a dismissal of the indictment, by a declaration of mistrial neither objected to nor expressly concurred in by the defendant.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> • • • [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb • • •.

STATEMENT

Respondent was indicted for attempted evasion of taxes due for 1969, 1970, and 1971, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201. A jury trial began on November 4, 1975. The prosecutor used a method of proof that required, in addition to showing a substantial increase in net worth, proof of either a likely source of taxable income (*Holland* v. *United States*, 348 U.S. 121) or the lack of any significant nontaxable income that might have accounted for the increase in net worth (*United States* v. *Massei*, 355 U.S. 595).

The prosecutor called Daniel Harris as a witness to testify about a likely source of taxable income for respondent. Harris testified that he and respondent had engaged in numerous transactions involving the sale of heroin in 1970 (App. A, *infra*, p. 2a). During Harris's testimony on November 12, 1975, defense counsel, Henry Rothblatt, stated that the defense had not been able to interview Harris (Nov. 12 Tr. 2). When the prosecutor responded that he believed that Harris had been interviewed by the defense, Rothblatt stated that he would telephone his associate to determine whether that was so (*id.* at 2-4; App. A, *infra*, p. 18a). The matter was apparently left there. In fact, Harris had been interviewed by an attorney from Rothblatt's firm approximately two months before trial. Harris stated at that interview that he had lied when he had told a grand jury that respondent had dealt in narcotics (*id.* at 6a-8a, 19a).

On the evening of November 20, 1975, after almost all of the evidence in the case had been submitted, Harris gave a tape-recorded statement to Rothblatt, consonant with the statement previously given to Rothblatt's associate, recanting his trial testimony (App. A, *infra*, p. 3a). Harris told Rothblatt that his false testimony was caused by threats made by federal officials (*ibid.*). An agent of the Internal Revenue Service testified that less than two hours after Harris spoke to Rothblatt, Harris disavowed his recantation, telling federal agents that his recantation had been induced by threats (*id.* at 18a).

The next morning Rothblatt informed the district court of Harris's recantation and filed a motion to dismiss the entire indictment on the ground of prosecutorial misconduct (App. A, *infra*, pp. 3a, 18a). A lengthy hearing was held outside the presence of the jury (*id.* at 3a, 19a). Harris was called as a witness but refused to testify (*id.* at 3a). At the conclusion of the hearing the district court denied the motion to dismiss but declared a mistrial. The court stated that respondent could "not get a fair and impartial trial under the present circumstances" (App. C, *infra*, p. 30a), because the "issue would become whether or not he was selling narcotics, and whether or not • • • Harris • • • could be believed" (*ibid.*) rather than whether respondent evaded taxes.

In the court's view, there was "manifest necessity for declaring a mistrial" so that "the ends of justice, public justice, would [not] be defeated" (App. C, *infra*, p. 31a). The court concluded that the prosecutors had not acted improperly and that no sanctions should be imposed on them (*ibid.*). The prosecution objected to any termination of the trial. Defense counsel responded to the court's ruling as follows (App. A, *infra*, pp. 4a, 21a): "Of course, your Honor, the defendant agrees with everything that your Honor has decided, except your Honor's decision to declare it a mistrial. We would renew our request for judgment of acquittal."

The government sought to retry respondent, who moved to dismiss the indictment on double jeopardy grounds. The district court granted the motion (App.

C, *infra*, pp. 27a-42a). The district judge, who was not the judge who had presided at the trial, concluded that respondent had not consented to the mistrial and that it was not justified by manifest necessity.

A divided panel of the court of appeals affirmed. Observing that the only motion offered was the motion to dismiss and that respondent had expressed a preference for an "acquittal" over a mistrial, the court concluded that respondent had neither requested nor consented to the declaration of mistrial (App. A, *infra*, pp. 4a-6a). The majority also concluded that the declaration of mistrial was not in the sole interest of the defendant (*id.* at 10a n.1) and that the failure of the trial court to make explicit findings about the alternatives to a mistrial operated to bar a retrial (*id.* at 13a-14a). The court then held that because there were obvious alternatives to a mistrial that the trial court had not explored, it could not be said with assurance that "manifest necessity" required a mistrial (*id.* at 9a-17a).

Judge Timbers dissented (App. A, *infra*, pp. 17a-25a). He argued that defense counsel should bear the responsibility of stating whether a mistrial would be objectionable. He concluded (*id.* at 20a-21a) that Rothblatt had assented to the district court's statement that a fair trial could not be had and that, under these circumstances, respondent's "failure to object to the mistrial constitutes a bar to his subsequent double jeopardy claim" (*id.* at 21a). Judge Timbers explained (*id.* at 25a) that "[s]ince the

very reason for requiring a hearing to determine the grounds for a mistrial declaration is to protect [the valued] right of the defendant [to have his case resolved by the jury], it does not strike me as unreasonable in the context of our adversary system to require him to assert that right."

REASONS FOR GRANTING THE PETITION

This case presents a facet of the problems that have arisen in the wake of *Illinois* v. *Somerville*, 410 U.S. 458, and *United States* v. *Dinitz*, 424 U.S. 600, concerning the propriety, under the Double Jeopardy Clause, of holding a second trial after the first trial is terminated prior to verdict. Three cases presenting one or another aspect of the retrial problem are before the Court in *Lee* v. *United States*, No. 76-5187, argued April 25, 1977; *Arizona* v. *Washington*, No. 76-1168, certiorari granted, April 18, 1977; and *Crist* v. *Cline*, No. 76-1200, jurisdiction postponed, April 25, 1977. Other related cases include *United States* v. *Scott*, 544 F.2d 903 (C.A. 6), petition for a writ of certiorari pending, No. 76-1382, and *United States* v. *Sanabria*, 548 F.2d 1 (C.A. 1), petition for a writ of certiorari pending, No. 76-1040.[1]

1. The Court held in *Dinitz* that the most significant factor in determining whether a second trial may be held after the first trial has been terminated

[1] We have furnished to counsel for respondent copies of our brief in *Lee*, our petition in *Scott*, and our memorandum in *Sanabria*.

before verdict is whether the defendant has been deprived of his valued right to receive the verdict of the factfinder at the first trial. "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of * * * error" (424 U.S. at 609; footnote omitted). The defendant may exercise this control both by what he does and by what he does not do. In the present case respondent exercised both sorts of control.

Respondent set in motion the events that led to the termination of his trial. He contended that a serious—indeed, fatal—error occurred in his trial. He induced the district court to halt the trial and hold a lengthy hearing concerning the nature and effects of Harris's recantation. At the conclusion of this hearing, he agreed with the district court's evaluation that the prospect of completing the trial properly was slight. Once defense counsel had put in motion the events that led to the declaration of a mistrial, we believe he must be held to have had an obligation to inform the court if respondent, contrary to appearances, would have preferred to proceed to verdict rather than have a mistrial.

After all, the valued right to receive the verdict of the factfinder at the first trial is the defendant's right. In an adversary system of criminal justice, the defendant should have some obligation to inform the court whether he desires to exercise that right or whether, instead, he is content with a mistrial proposed by the court. We therefore urge here the

position of the dissenting judge below—that the failure explicitly to object to the declaration of a mistrial should be taken as consent. Here, as in *Dinitz*, the defendant was not deprived of the opportunity to exercise primary control over the course of events to be followed when a question arose concerning the wisdom of proceeding with the trial.

The court of appeals' holding, that an explicit objection to the declaration of a mistrial is unnecessary, conflicts with the holdings of several other courts of appeals. Those courts hold that silence in the face of a declaration of a mistrial must be taken as consent, at least when the defendant has sufficient opportunity to indicate whether he wishes to accept the mistrial or proceed to verdict at the first trial.[2] The Court may resolve this conflict in *Crist* v. *Cline*, *supra*, in which the defendant apparently did not object to the declaration of a mistrial, and the proper disposition of this case therefore may be influenced by this Court's disposition of *Crist*.[3]

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[2] In addition to the cases collected at App. A, *infra*, p. 22a, see *Roberts* v. *United States*, 477 F.2d 544, 545-546 (C.A. 8); *United States* v. *Pappas*, 445 F.2d 1194, 1199-1200 (C.A. 3); *Scott* v. *United States*, 202 F.2d 354, 355-356 (C.A.D.C.), certiorari denied, 344 U.S. 879. But see *Himmelfarb* v. *United States*, 175 F.2d 924, 931 n. 1 (C.A. 9), certiorari denied, 338 U.S. 860.

[3] Presumably, the Court would reach this issue in *Crist* only if it first rejected Montana's argument that the state rule postponing the "attachment" of jeopardy in a jury trial until the first witness testifies is consistent with the Fifth Amendment.

Respondent's request for an order dismissing the indictment on account of prosecutorial misconduct also amounted to an explicit request to terminate the trial for the very reason that induced the district court to grant a mistrial. Under these circumstances, the argument we have made in *Lee* (Br. 14-27) would apply to this case. Respondent affirmatively sought a termination of the ongoing trial, a trial that the prosecutor sought to continue (App. C, *infra*, p. 32a). This aggressive request to terminate the trial surrendered respondent's valued right to receive the verdict of the jury. True, respondent would have preferred a punitive order dismissing the indictment or granting an "acquittal" to the grant of a mistrial (see App. A, *infra*, p. 4a), but he also evidently preferred a mistrial to the continuation of his trial.[4]

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[4] After the district court had announced that, in its view, manifest necessity required the declaration of a mistrial, respondent's counsel stated (App. A, *infra*, p. 4a) that "the defendant agrees with everything that your Honor has decided, except your Honor's decision to declare it a mistrial. We would renew our request for judgment of acquittal." The court of appeals construed this statement as implicitly withholding consent to the declaration of a mistrial. But this is a strained reading of counsel's statement; it is more naturally read as a statement that respondent preferred an "acquittal" to a mistrial, but would accept a mistrial if that was the best he could obtain. Counsel had the opportunity to object in more easily understood terms. He could have said, for example: "Your Honor, if you will not dismiss the indictment,

Since respondent was responsible for the termination of the trial, at the time it was terminated, and for reasons respondent had pressed upon the court, the Double Jeopardy Clause does not bar a second trial.

2. Another factor of potential significance is that respondent contributed to the events that led to the declaration of a mistrial. Although we do not question the finding of the courts below that defense counsel was not guilty of any deliberate impropriety, counsel's neglect to learn the substance of Harris's disclosures to counsel's associate until after Harris had left the witness stand made it much more difficult to conduct the trial in the ordinary course. As Judge Timbers pointed out (App. A, *infra*, pp. 18a-20a), but for Mr. Rothblatt's neglect Harris could have been cross-examined about the matters that formed the basis of his later recantation, and if Harris had been confronted with his prior inconsistent statements to Rothblatt's associate there might never have been a perceived need to terminate the trial. What weight, if any, should be attached to the role of the defense in precipitating a preverdict termination is a question that is before the Court in *Arizona* v. *Washington*, *supra*, in which a mistrial was declared in response to an improper opening statement by defense counsel.

3. In many cases the central question is whether a defendant may be tried a second time after the

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then the defendant desires to continue with the case and present his arguments to the jury." He did not do so, however. Only the prosecutor asked the court to carry on with the trial.

first trial ended because of an error or circumstance over which the defendant had no control. In such cases the court must decide, as it did in *Wade* v. *Hunter*, 336 U.S. 684, whether competing societal interests outweigh the defendant's valued right to receive the verdict of the factfinder at the first trial. In the present case, however, respondent controlled or influenced the circumstances that led to a termination of his trial. He persuaded the district court to terminate the trial, contending that the error was so serious that the prosecution should not be allowed to continue. The prosecutor, on the other hand, asked the district court to proceed with the trial (App. C, *infra*, p. 32a). Respondent was in fact entitled to no relief at all. The district court found no evidence of prosecutorial misconduct (*id.* at 31a), and the court of appeals concluded that respondent's interests could have been protected without either terminating the trial or dismissing the indictment (App. A, *infra*, pp. 14a-16a). Respondent should not now be entitled to immunity from further prosecution because he persuaded the district court to give him improper relief; the relief may have been less than he requested, but it was more than he should have received. We submit that a defendant who induces a court erroneously to terminate a trial may properly be required to stand trial a second time.

We have made a similar argument in *United States* v. *Sanabria*, *supra*, and *United States* v. *Scott*,

supra.[5] The First Circuit in *Sanabria* accepted this argument, and under its analysis a second trial could have been held in this case if the district court had granted respondent's motion to dismiss the indictment.[6] Here, as in *Sanabria*, *supra*, 548 F.2d at 6, "a future prosecution * * * will not threaten one of the principal private interests protected by the clause: the criminal defendant's interest in preserving a district court's ruling that he is not criminally responsible." [7] The analysis of *Sanabria* conflicts with the an-

[5] See also *United States* v. *Sedgwick*, 345 A.2d 465 (D.C. App.), certiorari denied, 425 U.S. 966, which is strikingly similar to the present case. The defendant Sedgwick requested an order dismissing the indictment as punishment for the prosecutor's failure to disclose certain allegedly exculpatory material. The trial court instead declared a mistrial and reserved decision upon the motion to dismiss. Some months later the court dismissed the indictment. The court of appeals reversed, finding no suppression of exculpatory material and holding that a second trial would not violate the Double Jeopardy Clause because the trial court had acted under a reasonable, if erroneous, belief that the mistrial was necessary to protect the defendant's interest. Cf. *Gori* v. *United States*, 367 U.S. 364. Three Justices dissented from the denial of certiorari in *Sedgwick*.

[6] See also *United States* v. *Appawoo*, C.A. 10, No. 76-1024, decided April 28, 1977 (a second trial may be held after a district court erroneously dismisses an indictment in mid-trial at the defendant's request, where the dismissal is based upon the alleged unconstitutionality of the underlying statute).

[7] Because neither respondent's request for an order dismissing the indictment nor the district court's grant of a mistrial resolved any issue of substantive criminal responsibility, the termination was not a true acquittal, and a second trial is not barred by the holding of *United States* v. *Martin*

alysis of the court of appeals in the present case. If the First Circuit is right in *Sanabria*, a second trial would not have been barred if the district court had granted respondent the dismissal he avidly sought, and respondent should not gain freedom from a second trial because the district court improvidently granted a mistrial rather than improvidently dismissing the indictment.

4. If the Court accepts our central argument in *Lee*, then it might be appropriate to grant the petition in the instant case and remand for a second trial. In any other event, however, the proper disposition of the present petition would depend upon the nature of the Court's analysis in *Lee*, the questions left open by that decision, whether the Court deems it appropriate to grant review in other cases (such as *Sanabria* or *Scott*) to address those questions, and the disposition of *Arizona* v. *Washington*, *supra*, and *Crist* v. *Cline*, *supra*. Because so many contingencies may affect the proper disposition of this case, we can make no recommendation at the present time whether the Court should grant this petition or hold it pending its disposition of other cases.

Linen Supply Co., No. 76-120, decided April 4, 1977, slip op. 7-8.

CONCLUSION

Consideration of the petition should be deferred pending the Court's decision in *Lee*.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MYRON C. BAUM,
Acting Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

ROBERT E. LINDSAY,
CHARLES E. BROOKHART,
Attorneys.

MAY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 276—September Term, 1976.

(Argued October 18, 1976 Decided March 9, 1977.)

Docket No. 76-1284

UNITED STATES OF AMERICA, *Appellant*

v.

SYLVIO J. GRASSO, *Appellee*

Before: SMITH, OAKES and TIMBERS, *Circuit Judges.*

OAKES, *Circuit Judge*:

This appeal presents the recurring issue whether retrial of the defendant appellee after his original trial ended in a mistrial declared by the trial judge sua sponte would violate the double jeopardy clause of the Fifth Amendment. The issue is one said to "escape meaningful categorization," as "virtually all of the cases turn on the particular facts," *Illinois* v.

Somerville, 410 U.S. 458, 464 (1973). Appeal here is by the Government from an order of the United States District Court for the District of Connecticut, Robert C. Zampano, *Judge*, granting the appellee's motion to dismiss his indictment for tax evasion on double jeopardy grounds. 413 F.Supp. 166 (D. Conn. 1976). We affirm.

On April 16, 1975, appellee was indicted on three counts of income tax evasion for the years 1969, 1970 and 1971, pursuant to 26 U.S.C. § 7201. Trial began on November 4, 1975, before T. Emmet Clarie, Chief Judge, and a jury. During the next eight trial days the Government called over 40 witnesses, one of whom was a Daniel Harris; the defendant presented ten witnesses, including himself; the Government called three witnesses in rebuttal; over 300 documents were admitted as exhibits; and the parties filed extensive requests for jury instructions. On November 26, 1975, when only the Government's final rebuttal witnesses remained to be heard, Judge Clarie declared a mistrial on his own motion after a two-day hearing.

The mistrial was precipitated by a recantation by Government witness Harris, a multiple offender then serving a term of imprisonment of eight to thirty years imposed in 1971 for the sale of heroin. He had received favorable consideration from the Board of Parole and was to be released from prison in December, 1975. His direct testimony was to the effect that he and the appellee, Grasso, had engaged in numerous transactions involving the sale of heroin in the year 1970. The testimony thus established an illegal source

for the appellee's alleged unreported income in that calendar year. Harris's testimony did not relate to the tax years 1969 or 1971. His testimony lasted a day and a half and consumed over 120 pages of transcript.

Several days after Harris had testified, he contacted the appellee's son, who in turn advised him to contact the court or appellee's counsel, Henry Rothblatt. Harris telephoned Judge Clarie's law clerk and asked him to tell Rothblatt to call "Dan" at a given number. Rothblatt proceeded to interview Harris at the local jail where he was being held, and tape-recorded a full recantation of Harris's trial testimony. The recanting witness stated that his false testimony was influenced by threats made by Government prosecutors and Internal Revenue Service agents in charge of the tax case, the alleged threats being that his parole would be revoked, that he would have to serve the full 30 years of his sentence, and that he might in addition be indicted on a perjury charge because of his previous grand jury testimony in the instant case.

Rothblatt immediately informed the court of Harris's recantation and filed a motion to dismiss based on prosecutorial misconduct. *See, e.g., Giglio* v. *United States*, 405 U.S. 150 (1972). Hearings were held outside the presence of the jury, with ten witnesses testifying, but Harris refused to testify, relying on the Fifth Amendment. Judge Clarie declared a mistrial on the basis that the defendant Grasso could "not get a fair and impartial trial under the present circumstances," since "the issue would be-

come whether or not he was selling narcotics, and whether or not . . . Harris could be believed," rather than whether or not Grasso evaded taxes. In Judge Clarie's view there was a "manifest necessity for declaring a mistrial" so that "the ends of justice, public justice, would [not] be defeated." Judge Clarie found no improper conduct on the part of the prosecutors or Government agents. He explicitly stated that "the issue of double jeopardy could be argued" in the event the Government decided to proceed with a retrial. The Assistant United States Attorney recorded his objection to the declaration of mistrial "for the record." For the defense Mr. Rothblatt said: "Of course, your Honor, the defendant agrees with everything that your Honor has decided, except your Honor's decision to declare it a mistrial. We would renew our request for judgment of acquittal."

The Government subsequently sought to retry appellee, who moved to dismiss the indictment on double jeopardy grounds. Judge Zampano granted the motion, so that it is the Government that appeals that decision.

I.

The Government's first argument is that the defendant consented to the declaration of a mistrial. The law is plain enough that, if a defendant himself moves for a mistrial or he consents to a declaration of mistrial made on the court's own motion or on the motion of the prosecution, he will be considered to have waived any double jeopardy plea. *See, e.g., United States* v.

Dinitz, 424 U.S. 600, 607-08 (1976); *United States* v. *Tatco*, 377 U.S. 463, 467 (1964); *United States* v. *Goldstein*, 479 F.2d 1061, 1065-68 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973); *United States* v. *Pappas*, 445 F.2d 1194, 1199-1200 (3d Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Burrell*, 324 F.2d 115, 119 (7th Cir. 1963), *cert. denied*, 376 U.S. 937 (1964); Note, *Mistrial and Double Jeopardy*, 49 N.Y.U.L. Rev. 937, 948 (1974). But here the appellee neither requested a mistrial nor consented thereto. As Judge Zampano found below, "the only motion offered or intended to be offered [by the appellee] was the motion to dismiss," 413 F. Supp. at 170, and, from Judge Clarie's two references during his oral ruling to the principle of double jeopardy, it may be inferred that he believed he was granting a mistrial sua sponte and not in response to the defendant's request, *cf. United States* v. *Gentile*, 525 F.2d 252, 255 (2d Cir. 1975) (fact that judge was unaware of double jeopardy problem contributes to inference that defense counsel consented to mistrial), *cert. denied*, 425 U.S. 903 (1976).

Nor can Mr. Rothblatt's remarks made after the judge had ruled, quoted above, in any way be construed as consenting to the mistrial. He very plainly said that he agreed with everything the court said, "except your Honor's decision to declare it a mistrial," and he renewed his request for a judgment of acquittal. It is true that he did not say that he objected to the mistrial and wished to proceed to the

jury, but affirmative consent may not be inferred from that silence.

II.

The Government argues in the alternative that, if there were no actual consent to the mistrial, consent should be implied because defense counsel's conduct precipitated the mistrial. *See United States* v. *Gentile*, *supra*, 525 F.2d at 252-58; *United States* v. *White*, 524 F.2d 1249, 1252 (5th Cir. 1975), *cert. denied*, —— U.S. —— (1976); *cf. United States* v. *Dinitz*, *supra* (no double jeopardy where misconduct by chief defense counsel in opening statement resulted in his expulsion, followed by defense request for mistrial). Following the Government's launching of an investigation into the reasons for the witness Harris's recantation, particularly whether there were threats of violence made against the witness, attorney Rothblatt's office voluntarily turned over to the Government memoranda of interviews of one Joseph Rose and of Harris conducted by attorney Ronald Goldfarb, a law clerk in that office. These interviews had been conducted in September, 1975, in connection with a pending civil rights action in which appellee Grasso was the plaintiff; the interviews took place on or about September 10, 1975, two months prior to commencement of trial in the criminal case. The Government calls our attention to the fact that the Goldfarb memoranda state that Harris told Goldfarb that he (Harris) had lied to Government agents concerning Grasso's activities in narcotics, and that Goldfarb had reason to believe Harris would sign a statement to that effect after his parole hearing scheduled for September, 1975. Thus the Government argues that defense counsel knew or should have known by September, 1975, that there was a contradiction in stories by Harris and failed to disclose this information to Judge Clarie. The Government therefore contends that the mistrial was a direct result of defense counsel's late production of the contradictory statement of Harris. The suggestion is that the defense chose not to contradict Harris with his prior inconsistent statement but waited until the trial was nearing completion to move for dismissal on the basis of the inconsistent statements in the tape recording of Harris.

When this suggestion of improper conduct on the part of defense counsel was made below, not by affidavit but by a "supplemental memorandum" in opposition to the defendant's motion to dismiss, Mr. Rothblatt filed an affidavit, uncontroverted in the record, stating that, at the time Goldfarb interviewed Harris and certain other inmates incarcerated in the Hartford area, "we are not aware that Harris was going to be a witness in this case." It went on to say that, when Harris first testified, Rothblatt assumed "he was among the inmates who had refused to talk to Mr. Goldfarb in September." The affidavit stated that he (Rothblatt) did not become aware of the memoranda prepared by Goldfarb until after he had returned to his office in New York following the declaration of the mistrial. The Rothblatt affi-

davit concluded that "in over 35 years as an active trial practitioner I have never undertaken, and would certainly never recommend, the reckless trial strategy suggested by the Government." Judge Zampano below found that "it is plain from the record that there was neither impropriety [n]or misconduct on the part of defense counsel" and that Rothblatt had performed his "affirmative duty to notify the trial judge that a witness had recanted his sworn testimony." 413 F. Supp. at 171.

There is nothing in this record to contradict either Mr. Rothblatt's affidavit or Judge Zampano's finding of "neither impropriety [n]or misconduct." Moreover, it hardly seems likely that experienced trial counsel would run the risk, had he known of the statement of Goldfarb, of letting Harris leave the stand without cross-examination in regard to that statement, failing to introduce the statement itself (after authentication by Goldfarb if necessary), and waiting for a possible further recantation that could be tape-recorded. The contrary suggestion seems to us farfetched; the Government here impugns Mr. Rothblatt's integrity as a member of the Bar and officer of the court based purely on conjecture. There is nothing to indicate that Mr. Rothblatt initiated the jail visit resulting in the tape recording. Quite to the contrary, so far as appears Harris himself initiated it. Nor was there anything improper in Mr. Rothblatt's visiting Harris during the trial in the absence of Government counsel and without advising Government counsel of Harris's request for the visit.

Our adversary system prescribes no legal or moral duty that would require counsel to advise his opponent that a witness who has previously testified for the opponent in a pending case wants to talk with him.

III.

When a mistrial is declared sua sponte by a court without defendant's consent, express or implied, the double jeopardy clause permits retrial of the defendant only if, in the words of Mr. Justice Story, "there [was] a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). This court has recently commented in *United States* v. *Gentile*, *supra*, 525 F.2d at 255, on the "wisdom" of Justice Story's further statement in *Perez* that "it is impossible to define all the circumstances which would render it proper" for the trial court to grant a mistrial without giving rise to a defense of double jeopardy, 22 U.S. (9 Wheat.) at 580, and Mr. Justice Black's comment in *Wade* v. *Hunter*, 336 U.S. 684, 690 (1949), relative to the impossibility of laying down a "rigid formula" on the subject. *See also Illinois* v. *Somerville*, *supra*, 410 U.S. at 464.

At the same time, as Judge Waterman once suggested, *United States* v. *Gori*, 282 F.2d 43, 50 (2d Cir. 1960) (en banc) (dissenting opinion), *aff'd*, 367 U.S. 364 (1961), it has not always been crystal clear how much discretion the *Perez* test leaves to a trial judge in a given set of circumstances. The very

vagueness of the Story formulation, while maintaining its verity, necessarily makes application imprecise. *See* Comment, *Double Jeopardy and Reprosecution After Mistrial: Is the Manifest Necessity Test Manifestly Necessary?*, 69 Nw. U.L. Rev. 887, 890 (1975). It was once thought, for example, that a sua sponte mistrial did not bar retrial if the mistrial had been declared "in the sole interest of the defendant." *Gori* v. *United States*, 367 U.S. 364, 369 (1961).[1] But we are now required, in resolving the question of "manifest necessity," to determine whether the trial judge considered all the procedural alternatives to a

[1] Even if this test still governed, it would not allow retrial here. Judge Clarie declared the mistrial to be in the interest of the defendant, but the judge himself noted that Harris was a "crucial" Government witness whose lack of credibility "contaminate[d] the trial." Had the evidence of the recantation been adduced, despite the introduction in rebuttal of Harris's grand jury testimony, or contrary testimony by the Government agents, the jury, like Judge Clarie, in all probability would not have believed Harris's testimony in any respect. The declaration of a mistrial did operate to prevent the defense from discrediting a key Government witness on an essential element of the crime, a likely source of unreported income, as to the tax year 1970, and from more generally claiming Government misconduct in the case. Further, as Judge Zampano held, 413 F. Supp. at 172, reprosecution would have given the Government "a solid tactical advantage." It could have refrained from calling Harris and presented its case against appellee for the year 1970 without his testimony or proceeded to seek convictions solely for the years 1969 and 1971. *Cf. United States* v. *Kin Ping Cheung*, 485 F.2d 689, 691-92 (5th Cir. 1973) (Government on retrial could sever and avoid embarrassment of having its own witness exculpate a defendant).

mistrial, so as "not to foreclose the defendant's option [to have his cause tried by the original jury] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *United States* v. *Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion of Harlan, *J.*).[2] *Jorn* has been

[2] In *United States* v. *Gentile*, 525 F.2d 252, 257 (2d Cir. 1975), dicta suggest that the *Jorn* test is itself dicta and the holding a mere reaffirmation of *Gori*, and that *Illinois* v. *Somerville*, 410 U.S. 458 (1973), vitiated the force of the *Jorn* rationale. But the "consideration of other alternatives" test in *Jorn* seems, with due respect to the *Gentile* opinion writer, more likely to have been the central holding of the case. After reviewing the history of the double jeopardy clause in the Supreme Court, and concluding that even under the *Gori* "sole interest" test there was not a case of mistrial solely for defendant's benefit, Mr. Justice Harlan continued that the *Gori* test "does not adequately satisfy the policies underpinning the double jeopardy provision," 400 U.S. at 483, because declaration of a mistrial, even solely for defendant's benefit, but without his consent and without exploration of other means of dealing with the situation, overlooks one of a defendant's rights in a criminal prosecution: the "valued right to have his trial completed by a particular tribunal." *Id.* at 484, *quoting Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). Justice Harlan's plurality opinion thus lays it down as a constitutional principle that a judge "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." 400 U.S. at 486. Section III of the *Jorn* opinion applies the law to the facts of the case solely under the "consideration of other alternatives" doctrine rather than the *Gori* "sole interest" analysis.

Illinois v. *Somerville*, 410 U.S. 458 (1973), does not vitiate the force of *Jorn*, *id.* at 471, but rather articulates the sensible

read to require the trial judge at least to consider viable alternative curative measures before sua sponte declaring a mistrial. *See, e.g., United States ex rel. Stewart* v. *Hewitt*, 517 F.2d 993, 996 (3d Cir. 1975); *United States* v. *Spinella*, 506 F.2d 426, 432 (5th Cir.) (Wisdom, *J.*), *cert. denied*, 423 U.S. 917 (1975); *United States* v. *Lansdown*, 460 F.2d 164, 168-69 (4th Cir. 1972).

Since evaluation of discretion is involved, a necessary procedural corollary of *Jorn* is that, before a trial judge declares a mistrial, he must make explicit findings, preferably after a hearing, that there are no reasonable alternatives to mistrial. *See, e.g., Whitfield* v. *Warden*, 486 F.2d 1118, 1122 (4th Cir. 1973), *cert. denied*, 419 U.S. 876 (1974). If no alternatives can be found, a mistrial may be declared, and a retrial cannot be attacked on double jeopardy grounds unless wrongdoing or negligence on the part of the Government caused the mistrial. *See United States* v. *Glover*, 506 F.2d 291 (2d Cir. 1974). Thus society's interest in "fair trials designed to end in just judgments," *Illinois* v. *Somerville*, *supra*, 410 U.S. at 470, is protected. If reasonable alternatives to a mistrial are available, the trial should continue.

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exception to it, that "where the declaration of a mistrial implements a reasonable state policy *and* aborts a proceeding that *at best* would have produced a verdict that could have been upset at will by one of the parties, the defendant's interest in proceeding to verdict is outweighed by the competing and equally legitimate demand for public justice." *Id.* at 471 (emphasis added). *Somerville* holds, then, that the double jeopardy clause will not bar retrial even though the examination of alternatives mandated by *Jorn* is not undertaken if to do so would be futile because clearly no reasonable alternative existed. *Accord, United States ex rel. Stewart* v. *Hewitt*, 517 F.2d 993, 996 (3d Cir. 1975); *United States* v. *Williams*, 411 F. Supp. 854, 858 (S.D.N.Y. 1976).

A failure to make any findings denigrates the defendant's "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, *supra*, 336 U.S. at 689, *quoted in United States* v. *Jorn*, *supra*, 400 U.S. at 484. For this reason, when a trial ends in a mistrial without any findings having been made as to alternatives to mistrial, the double jeopardy clause will usually bar a retrial of the defendant. This would not hold true in cases in which it is clear that there are no alternatives. Note 2 *supra*. When, for example, the trial, if continued, "at best would have produced a verdict that could [be] upset at will by one of the parties," *Illinois* v. *Somerville*, *supra*, 410 U.S. at 471; *cf. United States* v. *Gentile*, *supra*, 525 F.2d at 258 (multiple defendants created "dilemma" for trial judge, in that either declaring mistrial or continuing trial could have led to contention of error by one of the defendants), no findings are required for a declaration of mistrial, and the double jeopardy clause will not bar retrial. *See United States ex rel. Stewart* v. *Hewitt*, *supra*, 517 F.2d at 996; *United States* v. *Williams*, 411 F. Supp. 854, 858 (S.D.N.Y. 1976). In all but the clearest cases, explicit findings are the best way for a trial judge to avoid the perils of the double jeopardy clause.

On the facts of the instant case, in which obvious alternatives to mistrial existed but were not explored,

we hold that the double jeopardy clause bars retrial. The options available to Judge Clarie were several. Harris could have been recalled for further defense cross-examination, and, in the event his claim of Fifth Amendment privilege were upheld, he could have been granted immunity from possible perjury charges in order to force him to testify. *See United States* v. *Spinella*, *supra*, 506 F.2d at 432. Alternatively, upon such recall, the tape recording of his recantation could have been admitted. *See* Fed. R. Evid. 804(a)(1), (2), (b)(3)(5). His previous testimony could have been struck with appropriate instructions. *See United States* v. *Newman*, 490 F.2d 139, 144-46 (3d Cir. 1974); *United States* v. *Cardillo*, 316 F.2d 606, 611-13 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963). Any consideration of these reasonable possibilities was at best oblique.[3] And, while the judge was acting

[3] In declaring a mistrial, Judge Clarie stated:

> The Court has, as counsel may well imagine, has given considerable thought to this problem that has arisen. I never had the question arise in this form during a trial before.
>
> But the Court is of the opinion that because of the perjury issue injected into the trial by the testimony of Daniel Harris, that the defendant Grasso can not get a fair and impartial trial under the present circumstances.
>
> If the issue went to the jury it would not be whether or not he failed to pay his income taxes; the issue would be of selling narcotics, which is in and of itself a kind of abhorrent business to most every one of us. The issue would become whether or not he was selling narcotics, and whether or not this man, Daniel Harris, would be believed.

[Footnote continued on page 15a]

with the very best of intentions, to protect the defendant from an unfair trial, the appropriate course was to solicit suggested alternatives from defense counsel. *See Whitfield* v. *Warden*, *supra*, 486 F.2d at 1123; *Jones* v. *Anderson*, 404 F. Supp. 182, 188 (S.D. Ga. 1974), *aff'd*, 522 F.2d 181 (5th Cir. 1975); Note, *supra*, 49 N.Y.U.L. Rev. at 952. This procedure may result in counsel's consent to the mistrial, or in his insistence on dismissal as the only

[3] [Continued]

> To do that we'd have to go 'way back to the statement to the three Hartford policemen and the County Detective in '71, and get the facts as to how the story originated, with the documents which are in evidence. And we'd have to begin to review the testimony before the grand jury that Mr. Buckley deduced when he was prosecutor, or assistant prosecutor.
>
> We'd have to review the tape, as has been filed in evidence by counsel, which he procured at the jail. We'd have to review the statement of the I.R.S. witnesses, who went over and received from him what is claimed to be an apparent contradiction of the tape.
>
> And the issue of Mr. Grasso's income tax evasion would be well lost in the question of whether or not Daniel Harris committed perjury. That would be the nub of the case, rather than the question of the defendant's failure to pay his income taxes.
>
> For this reason the Court is of the opinion that the motion to dismiss would be denied, but that a mistrial should be ordered, because there is a manifest necessity for declaring a mistrial. Otherwise, the ends of justice, public justice, would be defeated.
>
> And that is what the Court is going to do. The Court is of the opinion that to permit the trial to go forward under the present circumstances would be an injustice to Mr. Grasso.

alternative. *See United States* v. *Sedgwick*, 345 A.2d 465, 473 (D.C. Ct. App.), *cert. denied*, 423 U.S. 1028 (1975). In either case, defendant cannot then argue on appeal that there were other reasonable alternatives to mistrial that should have been explored. The responsibility, however, is on the court to ask, and not on the defendant on his own to suggest, alternatives in a sua sponte mistrial situation. Useful alternatives may result from such an inquiry, although of course the court is free explicitly to reject them as inadequate to cure the situation.

There can be no claim here that, if continued, the proceeding would have produced a verdict that could have been upset at will by one of the parties. Striking Harris's testimony, for example, would almost certainly not have resulted in reversible error. The Government, moreover, had proof of other sources of 1970 income (such as from defendant's bail bonding business) that would have likely produced unreported income. Even were this not so, the case certainly could have gone to the jury with regard to calendar years 1969 and 1971.

Here, after argument on a motion to dismiss, the court declared a mistrial without hearing either side's views on the subject. This was done with no mention of the alternatives raised above, and no findings on the question of alternatives, the statement being only that the issues would be confused if the trial were continued. *See* note 3 *supra*. As was true in *Jorn*, however well intentioned, the trial judge here "made no effort to exercise a sound discretion

to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial." 400 U.S. at 487, *quoted in Illinois* v. *Somerville*, *supra*, 410 U.S. at 466.

Judgment affirmed.

TIMBERS, *Circuit Judge*, dissenting:

In the name of the double jeopardy clause of the Fifth Amendment of the United States Constitution,[1] the majority has sanctioned the dismissal of a federal income tax evasion indictment after eight days of trial and at a time when the trial was all but concluded. Since I believe that the majority has either ignored or glossed over critical facts with respect to the combined conduct of defendant and his trial counsel, and that such conduct heavily contributed to, and amounted to implied consent to, the trial court's declaration of a mistrial, I respectfully dissent.

I.

Since "virtually all [double jeopardy] cases turn on the particular facts . . .", *Illinois* v. *Somerville*, 410 U.S. 458, 464 (1973), a good starting point here is a brief reference to important facts ignored by the

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[1] ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ." U.S. Const., amend. V, cl. 2.

majority which precipitated the mistrial and the subsequent double jeopardy claim.

On September 9, 1975—two months before Grasso's income tax evasion trial began in the district court—government witness Harris told a member of the staff of defense attorney Rothblatt that his testimony before the grand jury regarding Grasso's narcotics dealings had been false. During the course of Grasso's trial which began on November 6, the government made out against him a strong case of unreported income for the years 1969 and 1971. On November 11 and 12 Harris testified for the government regarding the year 1970. Harris did not testify at all regarding 1969 or 1971. On November 12 Rothblatt informed the court that the witness Harris previously had refused to be interviewed by a member of his staff.

On the evening of November 20—after Rothblatt had rested defendant's case and after Rothblatt's motion for a directed verdict had been denied—Rothblatt had a tape-recorded interview with Harris, during the course of which Harris recanted his testimony. Less than two hours later Harris recanted his recantation to Special Agents of the Intelligence Division of the Internal Revenue Service. Harris told the I.R.S. agents that his recantation to Rothblatt was a lie which had been induced by threats.

On the next day, November 21, with the trial all but over, Rothblatt informed Chief Judge Clarie of Harris' recantation and moved to dismiss the indictment on the ground of *prosecutorial misconduct*.

After three days of hearings out of the presence of the jury, the court on November 26 declared a mistrial sua sponte.

The September 9 memorandum of the interview between Harris and a member of Rothblatt's staff, during which Harris disclosed that he had lied before the grand jury, came to light subsequent to Judge Clarie's declaration of a mistrial. When it did come to light, Rothblatt, who was the attorney of record in the civil action in connection with which the interview with Harris had been conducted, filed an affidavit stating that he "was simply not aware" of the memorandum until after the mistrial had been declared.

Whatever may be said as to the knowledge on the part of the *Rothblatt firm* regarding the existence of the memorandum of the critical interview with Harris two months before the tax evasion trial of Rothblatt's client began,[2] I recognize that this case is on a different footing with respect to the volitional element which was present in other cases where consent to a mistrial has been implied from the conduct of defense counsel. See, e.g., *United States* v. *Gentile*, 525 F.2d 252 (2 Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). Nevertheless, I find it difficult to blink at the hard

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[2] I had supposed that the day had long since passed when one member of a law firm would be permitted to disclaim knowledge of the existence of a critical document in the possession of his firm—when the disclaimer of such knowledge is invoked to cloak his client with the protection of the double jeopardy clause.

fact that Grasso here invokes the protection of the double jeopardy clause triggered by the declaration of a mistrial which was granted to remedy a prejudicial situation brought about by his counsel's negligent failure to examine his own records. If Rothblatt had checked his office records, as he said he would, after the matter of a prior interview of Harris by a member of Rothblatt's staff came up in court on November 12, Harris' credibility of course would have emerged as a principal issue at the appropriate time, namely, upon Rothblatt's cross-examination of Harris.

II.

It seems to me that the concept of implied consent to the declaration of a mistrial, as applied to the facts of this case, involves more than scrutiny of counsel's role in precipitating the sua sponte ruling. Counsel should bear the responsibility, at the very least, to state his client's objection to the mistrial declaration and to assert his client's "valued right to have his trial completed by a particular tribunal", *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949), *at the time the mistrial is declared*, and not sit back and wait for a subsequent double jeopardy hearing.

Here defendant's counsel did almost precisely the opposite. In declaring a mistrial, Judge Clarie stated that "the defendant Grasso can not get a fair and impartial trial under the present circumstances." To this attorney Rothblatt responded:

> "[*T*]*he defendant agrees with everything that your Honor has decided*, except your Honor's decision to declare it a mistrial. We would renew our request for judgment of acquittal." (emphasis added).

After the case was reassigned for trial, Grasso's counsel discovered that his client did not agree at all with everything Judge Clarie had decided. He asserted for the first time that Judge Clarie had ignored "several ways to cope with [Harris' recantation] without introducing reversible error. . . . [T]here was simply no justification . . . for taking away the defendant's opportunity for a favorable verdict."

As the majority holds, Rothblatt's statement in response to Judge Clarie's declaration of a mistrial on November 26 cannot be read as an *objection* to a mistrial. Unlike the majority I am not at all sure that the statement did not amount to an express *consent* to a mistrial. But whether it did or not, such an affirmative effort on the part of defendant's counsel to reinforce the trial judge's position hardly can be dismissed as "silence".

In any event, I would hold that Grasso's failure to object to the mistrial constitutes a bar to his subsequent double jeopardy claim. Other courts have required affirmative conduct on the part of a defendant to preserve a double jeopardy claim.[3] See, e.g.,

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[3] The Supreme Court explicitly left this question open in *Gori* v. *United States*, 367 U.S. 364, 365 n. 6 (1961).

A knowing, voluntary, and intelligent waiver of a double jeopardy right is not a condition to permitting a retrial fol-

United States v. *Gordy*, 526 F.2d 631, 635 & n. 1 (5 Cir. 1976); *United States* v. *Phillips*, 431 F.2d 949 (3 Cir. 1970); *United States* v. *Sedgwick*, 345 A.2d 465, 473 (D.C. Ct. App. 1975), *cert. denied*, 423 U.S. 1028 (1975); cf. *Scott* v. *United States*, 202 F.2d 354 (D.C. Cir.), *cert. denied*, 344 U.S. 879 (1952). But see *Himmelfarb* v. *United States*, 175 F.2d 924 (9 Cir.), *cert. denied*, 338 U.S. 860 (1949); *People* v. *Compton*, 6 Cal. 3d 55, 63, 490 P.2d 537, 542, 98 Cal. Rptr. 217, 222 (1971). And our Court has held defendants culpable for their silence in three cases where we have rejected double jeopardy claims. *United States* v. *Gentile*, *supra*, 525 F.2d at 255; *United States* v. *Beckerman*, 516 F.2d 905, 909 (2 Cir. 1975); *United States* v. *Goldstein*, 479 F.2d 1061, 1067 (2 Cir.), *cert. denied*, 414 U.S. 873 (1973). In each of these cases, in holding the defendant to have consented impliedly to the declaration of a mistrial, we weighed as a principal factor the defendant's failure to assert his interest in having his guilt determined by the existing jury.

These decisions recognize that the double jeopardy clause does not confer upon a defendant a license to take undue advantage of the contradictory possibilities which arise when a mistrial is declared. I would not construe the double jeopardy clause so as to permit a defendant who is ready to sacrifice his interest in reaching an existing jury in exchange for a dismissal on double jeopardy grounds to obviate the need

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lowing a mistrial. *United States* v. *Dinitz*, 424 U.S. 600, 609 n. 11 (1976).

for his reaching any jury at all. Such a defendant might be all too willing to sit by silently and refrain from bringing to the trial court's attention alternative solutions.[4] I see nothing in the double jeopardy bar which either requires that this choice be left to the defendant or which relieves him of the normal obligation to make a timely objection to an adverse ruling by the trial court. On the contrary, requiring the defedendant to assert his right to have his guilt decided by the existing jury will assure that a subsequent double jeopardy dismissal in fact does serve to vindicate the right asserted. Such a requirement moreover would tend to alleviate the problems which underlay the holding of *Gori* v. *United States*, 367 U.S. 364, 369 (1961), that a mistrial "granted in the sole interest of the defendant" does not necessarily bar all retrial. Protecting a defendant's interests through resort to a mistrial would be much less a matter of navigating "a narrow compass between Scylla and Charybdis", *id.*, if the defendant could be relied upon, and indeed required, to participate in the determination.[5]

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[4] Grasso's about face in first agreeing and then disagreeing with Judge Clarie's ruling of November 26 is a striking example.

[5] Judge Friendly concluded in *United States* v. *Gentile*, *supra*, 525 F.2d at 256-57, that the continuing validity of the *Gori* approach was put into question by Mr. Justice Harlan's plurality opinion in *United States* v. *Jorn*, 400 U.S. 470 (1971), but that in light of *Illinois* v. *Somerville*, 410 U.S. 458 (1973), it cannot yet be consigned to oblivion with any certainty. I continue to prefer Judge Friendly's cautious

A requirement that the *defendant* take affirmative steps to preserve his right to a determination by the existing jury ultimately looks toward the same end the majority seeks to achieve by requiring the *trial judge* to make "explicit findings, preferably after a hearing, that there are no reasonable alternatives to mistrial." Ante, pp. 2256-7. The common objective of both the majority and this dissent is a reasoned consideration of possible alternatives—insulated from the heat of the kitchen into which the trial judge is thrust when compelled to declare a mistrial sua sponte. But I disagree with the majority's premise that procedural strictures applicable to the trial court alone will protect fully the integrity of the double jeopardy prohibition. The majority, while placing all responsibility on the court's shoulders, appears to rely on the therapeutic effect of a hearing to coax the defendant out of his corner and into taking a stand.

> "This procedure may result in counsel's consent to the mistrial, or in his insistence on dismissal as the only alternative. . . . In either case, defendant cannot then argue on appeal that there were other reasonable alternatives to mistrial that should have been explored." — F.2d at ——.

Aside from its misplaced reliance on what does *not* go on in the realistic world of the trial court, the majority ignores the fact that, even after a sua sponte declaration of a mistrial, a proceeding must

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assessment in *Gentile* rather than the attenuated footnote treatment by the majority here. Ante, pp. 2255-2256 n. 2.

have participating parties. Since the very reason for requiring a hearing to determine the grounds for a mistrial declaration is to protect a right of the defendant, it does not strike me as unreasonable in the context of our adversary system to require him to assert that right.

I would remand with instructions to reinstate the indictment for retrial.[6]

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[6] Ironically, although I would remand the case for reinstatement of the indictment and retrial, whereas the majority affirms the judgment of the district court, I do *not* share the majority's criticism of the conduct of the district court. Ante, pp. 2259-2260. Based on my careful review of the entire record, I am satisfied that both Chief Judge Clarie and Judge Zampano, on the facts before them, discharged their respective judicial responsibilities in a commendable fashion. My quarrel with the result, and hence my dissent, is directed at quite a different quarter, as my dissenting opinion makes plain.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of March one thousand nine hundred and seventy-seven.

Present: HON. J. JOSEPH SMITH
HON. JAMES L. OAKES
HON. WILLIAM H. TIMBERS
Circuit Judges

76-1284

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

SYLVIO J. GRASSO, DEFENDANT-APPELLEE

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

A true copy,
A. DANIEL FUSARO
Clerk
[SEAL]

by _____
ARTHUR HELLER
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

Criminal No. H-75-52

[Filed May 13, 1976, U.S. District Court, New Haven, Conn.]

UNITED STATES OF AMERICA

v.

SYLVIO J. GRASSO

RULING ON DEFENDANT'S MOTION TO DISMISS

The issue presented by defendant's motion to dismiss is whether the Double Jeopardy Clause of the Fifth Amendment will be violated by the retrial of the defendant, Sylvio J. Grasso, after his original trial ended in a mistrial declared by the trial judge, *sua sponte*.

I.

The moving papers indicate that on April 16, 1975, the defendant was indicted on three counts of income tax evasion for the years 1969, 1970 and 1971, in violation of 26 U.S.C. § 7201. Since the government revealed its intention to proceed on a net worth theory of prosecution, the defendant moved for and received broad pretrial discovery. Trial commenced on November 4, 1975, before the Honorable T. Emmet

Clarie, Chief Judge, and a jury duly empanelled and sworn. During the next eight trial days, the government called over 40 witnesses to testify on its case-in-chief; the defendant presented ten witnesses, including himself; the government called three witnesses in rebuttal; and, over 300 documents were admitted as exhibits. In addition, the parties filed extensive requests for jury instructions. On November 26, 1975, as the government was preparing to call its final rebuttal witnesses, Judge Clarie aborted the trial on his own motion after a two-day hearing.

The circumstances leading to the mistrial were as follows. During the course of the government's direct case, one Daniel Harris was called to testify. Harris had multiple felony convictions in his background and was presently serving a term of imprisonment of 8-30 years imposed in 1971 for the sale of heroin. However, he had had favorable consideration from the Board of Parole and was due to be released from prison in December, 1975. Harris testified at length that he and the defendant had engaged in numerous transactions involving the purchase and sale of heroin in the year 1970. The obvious purpose of this evidence was to establish an illegal source for the defendant's alleged unreported income in the calendar year 1970. Harris' testimony extended over a period of a day and a half and consumed over 120 pages of transcript.

Several days after he testified, Harris contacted Henry Rothblatt, the defendant's attorney, and re-

quested an interview at the local jail. Rothblatt visited Harris and recorded a full recantation of Harris' trial testimony. Among other things, Harris stated that his false testimony was influenced by coercion and threats made by government prosecutors and the agents in charge of the tax case. He asserted that when he informed these officials prior to trial that he did not wish to appear, they responded that unless he changed his mind his parole would be revoked, he would have to serve the full 30 years of his sentence, and he would also be indicted on a perjury charge because of his grand jury appearance in the instant case. As a consequence, he claimed he was forced to testify falsely against the defendant.

Rothblatt immediately relayed Harris' disclosures to Judge Clarie and filed a motion to dismiss based on prosecutorial misconduct, citing as authority *Giglio* v. *United States*, 405 U.S. 150 (1972); *Brady* v. *Maryland*, 373 U.S. 83 (1963); and *Berger* v. *United States*, 295 U.S. 78 (1935). Hearings were held on November 21 and 25, at which ten witnesses were heard outside the presence of the jury. However, Harris refused to testify, relying on the protections afforded by the Fifth Amendment.

On November 26, Judge Clarie ruled in relevant part as follows:

> The Court: The Court has, as counsel may well imagine, given considerable thought to this problem that has arisen. I never had the question arise in this form during a trial before.

But the Court is of the opinion that because of the perjury issue injected into the trial by the testimony of Daniel Harris, that the defendant Grasso can not get a fair and impartial trial under the present circumstances.

If the issue went to the jury it would not be whether or not he failed to pay his income taxes; the issue would be of selling narcotics, which is in and of itself a kind of abhorrent business to most every one of us. The issue would become whether or not he was selling narcotics, and whether or not this man, Daniel Harris, could be believed.

To do that we'd have to go 'way back to the statement to the three Hartford policemen and the County Detective in '71, and get the facts as to how the story originated, with the documents which are in evidence. And we'd have to begin to review the testimony before the grand jury that Mr. Buckley educed when he was prosecutor, or assistant prosecutor.

We'd have to review the tape, as has been filed in evidence by counsel, which he procured at the jail. We'd have to review the statement of the I.R.S. witnesses who went over and received from him what is claimed to be an apparent contradiction of the tape.

And the issue of Mr. Grasso's income tax evasion would be well lost in the question of whether or not Daniel Harris committed perjury. That would be the nub of the case, rather than the question of the defendant's failure to pay his income taxes.

For this reason the Court is of the opinion that the motion to dismiss would be denied,

but that a mistrial should be ordered, because there is a manifest necessity for declaring a mistrial. Otherwise, the ends of justice, public justice, would be defeated.

And that is what the Court is going to do. The Court is of the opinion that to permit the trial to go forward under the present circumstances would be an injustice to Mr. Grasso.

The Court can not find that there was improper conduct on the part of the prosecutor, or as far as the Government agents or investigators are concerned. The Court certainly is of the opinion that this man, Daniel Harris, couldn't be believed if he put his hand on two Bibles—I wouldn't believe him under any circumstances, after hearing what has been educed here in this trial. I don't think he is believable.

But to say that the Government knew he was not truthful and put him on notwithstanding that, I think would be an unfair accusation.

• • • •

But I think it would be unfair to Mr. Grasso to let that become a focal point of whether this case should be tried and go forward. Because if he were found guilty it would always be a conclusion of his, certainly, and possibly of others, that that was the reason for the jury's conclusion of guilt, because of the contamination of the alleged sale of narcotics, based upon perjurious testimony of Daniel Harris.

The Court is firmly of the opinion that a mistrial should be granted. And the Government can decide whether or not at any future time

they wish to proceed further with the prosecution. At that time the issue of double jeopardy could be argued, and can move in proper form at that time.

That is the ruling of the Court. (Tr., November 26, 1975, pp. 12-14).

As soon as the judgment of the court was announced, Assistant United State's Attorney Hartmere responded:

Your Honor, for the record, the Government strongly opposes the Court's ruling. (Id., at 14).

In addition, Attorney Rothblatt took exception to the court's decision and unsuccessfully attempted to renew his request for a judgment of acquittal.

In discharging the jury, Judge Clarie further amplified his reasons for declaring a mistrial:

Now, because this, because of this perjury issue being injected into this trial by the testimony of the witness, Daniel Harris, the Court is of the opinion that a fair and impartial trial can not be assured for the defendant.

For this reason the jury is discharged, is discharged from giving a verdict in this case, because there is a manifest necessity for declaring a mistrial. Otherwise, the ends of justice would be defeated. The factual issues are income tax evasion—what the trial is all about, and they have been indelibly stained with the perjury of Daniel Harris concerning the defendant's alleged dealings in narcotics.

His statement infected and contaminated the trial so that the defendant could not get a fair trial on the allegations of income tax evasion with which he'd been charged.

* * * *

Now, I am not permitted to determine under the circumstances where the truth lies, but certainly under the circumstances I would not believe Daniel Harris.

In a case that starts out as an income tax evasion case it is necessary of course for the Government to demonstrate and prove that there were possible other sources of income, in addition to showing that he failed to report them. And it concerned all this extra money. It is incumbent upon the Government to demonstrate and show that there are possible sources of income.

Now, had Daniel Harris testified that the defendant was in the newspaper business, on the side, or that he was selling peanuts on the side, and he lied about it, it wouldn't be nearly as damaging as to say that he sold bundles of heroin. Once you get into that area of heroin and narcotics, it is the opinion of the Court that the question of truth or falsity of this Daniel Harris, a crucial witness, contaminates the trial; it leaves a stain.

Because the jury—many people today, anyone connected with narcotics, it is the most terrible thing that could happen to them, because everybody is so distressed about narcotics.

But here the man accuses the defendant of being involved in narcotics, in an income tax trial. And it seems to me that that has so

contaminated the issues—particularly with the give and take of truth or falsity here—that under the circumstances a fair trial could not be secured for the defendant.

And above everything else it is the Court's duty—sometimes it is unpleasant after sitting for eight days, as you have—and I have listened for a couple of days to other testimony in the case—with all the back up of business we have, to have to declare a mistrial.

But justice comes first. And if that is what is necessary, it is the duty of the Court to declare a mistrial.

It is then up to the Government to decide whether they want to try the case over again, before another jury, and it is the privilege of the defendant to argue at that time the principle of double jeopardy. And at that time that issue will be resolved at any future trial that might be had.

So I briefly, summarily, have given you this background in a nutshell. It is an unusual hapening during the course of a trial, but those things will and can happen.

The paramount thing is to assure every defendant who comes into this court a fair trial. That is the duty of the Court, and upon that basis the Court will follow that principle. (Tr., November 25, 1975, pp. 15-16, 17-19).

When the government set his case down for a retrial, the defendant promptly filed the instant motion to dismiss which Judge Clarie assigned to this Court for disposition.

II.

It is settled law that, in the absence of the defendant's request or consent, there can be a new trial after a mistrial has been declared if "there is a manifest necessity for the [mistrial] or the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 9 Wheat. 579, 580 (1824). See also *United States* v. *Jorn*, 400 U.S. 470, 481 (1971); *Wade* v. *Hunter*, 336 U.S. 684, 691 (1949); *Simmons* v. *United States*, 142 U.S. 148, 154 (1891). The manifest necessity test of *Perez* obviously contemplates a sound and sensitive exercise of discretion by the trial judge which must be tested on a case by case basis. *United States* v. *Dinitz*, —— U.S. —— (March 8, 1976); *Illinois* v. *Somerville*, 410 U.S. 458, 462 (1973); *United States* v. *Gentile*, 525 F.2d 252, 255-256 (2 Cir. 1975).

In deciding whether to declare a mistrial *sua sponte*, a trial judge must carefully weigh the defendant's valued right to have his trial completed by a particular jury, *Downum* v. *United States*, 372 U.S. 734, 736 (1963), with society's interest in fair trials designed to insure just judgments. *United States* v. *Jorn*, supra at 480. Various factors may be placed on the scale. A motion for a mistrial made by the defendant or with his consent may remove the barrier to reprosecution, even in the presence of prosecutorial or judicial error. *United States* v. *Jorn*, supra at 485; see also *United States* v. *Dinitz*, supra; *United States* v. *Gentile*, supra. Another trial is per-

missible if the judge, in declaring a mistrial *sua sponte*, was acting "in the sole interest of the defendant," *United States* v. *Gori*, 367 U.S. 364, 369 (1961), or if "a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious error in the trial." *Illinois* v. *Somerville*, supra at 464. On the other hand, jeopardy attaches if the defendant "would be harassed by successive, oppressive prosecutions," or if the judge "exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori* v. *United States*, supra at 369; see also *United States* v. *Jorn*, supra at 486.

III.

Applying these principles to the facts in the instant case, the Court, for several reasons, is compelled to conclude that a retrial would violate the defendant's constitutional right not to be twice put in jeopardy.

First, contrary to the government's suggestion, the defendant did not request a mistrial. The presentation of the motion to dismiss, the arguments of counsel pursuant thereto, the ruling of the trial judge, and the reaction of the attorneys immediately following the announcement of the mistrial, disclose conclusively that the only motion offered or intended to be offered was the motion to dismiss. There was no mention of a request for a mistrial as an acceptable alternative. It is also significant to note that Judge

Clarie stated on two occasions during his oral ruling that the "principle of double jeopardy" might be a relevant consideration in the event the government decided "to proceed further with the prosecution" before another jury. The references to a possible jeopardy defense at a retrial clearly indicate Judge Clarie was granting a mistrial *sua sponte* and not in response to the defendant's request. See *United States* v. *Dinitz*, supra; *United States* v. *Jorn*, supra.

Second, the Court must reject the government's contention that there was an implied consent to the mistrial because the defendant's attorney engaged in a course of conduct calculated to abort the trial. Compare *United States* v. *Gentile*, supra. While it is true that the dismissal petition triggered the *sua sponte* declaration of a mistrial, it is plain from the record that there was neither impropriety or misconduct on the part of defense counsel during the events and proceedings surrounding the mistrial nor was the motion to dismiss a frivolous petition. As an officer of the court and lawyer for the defendant, Attorney Rothblatt had the affirmative duty to promptly notify the trial judge that a witness had recanted his sworn testimony. Probable perjurious testimony must, of course, be immediately reported to the presiding judge in the interests of justice and to preserve the integrity of the judicial process.

Recantation of a witness' testimony at trial is not a rare occurrence. See, e.g., *United States ex rel. Sostre* v. *Festa*, 513 F.2d 1313 (2 Cir. 1975); *United States ex rel. Rice* v. *Vincent*, 491 F.2d 1326 (2 Cir.

1974); *United States* v. *Silverman*, 430 F.2d 106 (2 Cir. 1970); *United States* v. *Polisi*, 416 F.2d 573 (2 Cir. 1969); *United States* v. *Mitchell*, 29 FRD 157 (D.N.J. 1962). Generally, false testimony is uncovered after trial and fathers an action for relief under Rule 33, Fed. R. Crim. P., or pursuant to 28 U.S.C. § 2255 or by way of a writ of habeas corpus.

When alleged perjury is revealed after a witness has testified but while the trial is still in progress, as in the case at bar, the trial judge has several options available to insure that the jury receives the impeaching evidence for its consideration in appraising the witness' credibility. These include the recall of the witness for further cross-examination and the introduction, if necessary, of the affidavit, tape-recording, or other document setting forth the recantation. Rules 607, 801(d)(1), 804(a)(2) and 804(b)(1), Federal Rules of Evidence (1975); cf. *United States* v. *Pfingst*, 490 F.2d 262 (2 Cir. 1973), cert. denied, 417 U.S. 919 (1974); *United States* v. *Klein*, 488 F.2d 481 (2 Cir. 1973), cert. denied, 419 U.S. 1091 (1974); *United States* v. *Blackwood*, 456 F.2d 526 (2 Cir.), cert. denied, 409 U.S. 863 (1972); *United States* v. *DeSisto*, 329 F.2d 929 (2 Cir.), cert. denied, 377 U.S. 979 (1964).

Thus, in the present case, if the incident involved only a recantation, without more, it must be assumed that, depending on the circumstances, Harris would have been recalled for further examination or the tape-recording would have been introduced into evidence. Cf. *United States* v. *Jorn*, supra at 485. However, in addition to the repudiation of his incriminating testimony, Harris relayed to Rothblatt certain facts which, if true, disclosed serious governmental misconduct sufficient to justify a dismissal. Cf. *United States* v. *Gerry*, 515 F.2d 130, 144 (2 Cir. 1975); *United States* v. *McCord*, 509 F.2d 334, 349 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975). Rothblatt's disclosures to Judge Clarie and the defendant's motion to dismiss, therefore, were consistent with the obligations of trial counsel and the procedural due process rights afforded an accused at trial.

Third, the Court is constrained to overrule the government's argument that under the standards enunciated in *Gori*, 367 U.S. at 369, reprosecution is not barred because the mistrial was "obviously in the sole interest of the defendant." Judge Clarie noted after the hearing on the motion to dismiss that Harris was a "crucial" government witness (Tr., November 26, 1975, p. 12) who "couldn't be believed if he put his hand on two Bibles" (Id.) and whose credibility "contaminates the trial" (Id. at 18). It necessarily follows, therefore, that if the trial had been permitted to continue and the recantation evidence had been presented to the jury, it was more than likely the jury would have completely discounted Harris' testimony, as indeed Judge Clarie did, and acquitted the defendant, at least with respect to the 1970 tax year. There is little question that the recantation provided unexpected but welcomed evidentiary weaponry in defense counsel's arsenal to wage a strong

assault on the government's case by renewed cross-examination and in summation. Few tools are more valuable to the skillful and experienced trial advocate to gain an acquittal in a criminal case than the sword of impeachment in combination with the shield of the doctrine of reasonable doubt. This is especially true in the context of a complex net worth tax prosecution wherein likely sources of unreported income are vital to a conviction. The mistrial here prevented defense counsel from discrediting a key government witness on this essential element of the crime and deprived the defendant of "the right to seek a favorable verdict from the first jury." *United States* v. *Glover*, 506 F.2d 291, 298 (2 Cir. 1974). As stated by Justice Harlan in *Jorn*:

> . . . in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. 400 U.S. at 486.

In addition, although the government objected to the mistrial, reprosecution would give it a solid tactical advantage. With commendable candor at the oral argument before this Court, government counsel admitted Harris would not be a witness on retrial. Thus the government would have ample time to retrench, to reconstruct its evidence, and to present its case against the defendant for the year 1970

without the tainted Harris testimony; or, it might proceed to seek convictions solely for the years 1969 and 1971. Cf. *United States* v. *Kin Ping Cheung*, 485 F.2d 689, 691-692 (5 Cir. 1973). While certainly not Judge Clarie's intention, it is evident that the mistrial served "as a post-jeopardy continuance to allow prosecution an opportunity to strengthen its case." *Somerville*, 410 U.S. at 469.

Fourth, the defendant has submitted evidence, not controverted by the government, that a retrial would be oppresive and would hamper the right to counsel of his own choice. Cf. *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). A retrial would constitute the fourth major criminal trial instituted against this defendant in recent years. In short, he is unable to retain private counsel for the next trial; he is substantially indebted to Attorney Rothblatt for services rendered to date; and, he has strained his financial resources to the limit.

Fifth, the trial was aborted after it had proceeded at length with a substantial amount of evidence introduced—far beyond the situation in *Downum* and *Somerville*. Cf. *United States* v. *Glover*, supra at 298. A conscientious preparation by court-appointed counsel at this stage of the proceedings would require extraordinary intrusions on the lawyer's time, exhaustive research and inspection of records, transcripts and exhibits, and would inevitably result in an inordinate delay affecting the defendant's right to a speedy trial.

Accordingly, the defendant's motion to dismiss is granted.

Dated at New Haven, Connecticut, this 13th day of May, 1976.

/s/ Robert C. Zampano
United States District Judge

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